IN THE
MISSOURI SUPREME COURT

CHRISTIAN COUNTY, MISSOURI,	)	
	)	
	)	
RESPONDENT,	)	Appeal No. SC87392
	)	
vs.	)	
	)	
EDWARD D. JONES AND COMPANY, LP, d/b/a EDWARD JONES	)	
	)	
	)	
APPELLANT.	)	

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY
THIRTY-FIRST JUDICIAL CIRCUIT
DIVISION TWO
THE HONORABLE J. MILES SWEENEY

SUBSTITUTE BRIEF OF PLAINTIFF-RESPONDENT

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ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Defendant/Appellant Edward D. Jones and Company, LP, d/b/a Edward Jones (Jones or Defendant) appeals from a judgment entered December 8, 2003 for the sum of $368,837.28, with simple interest at the lawful rate of 9% from the date of conversion, June 1996, for a total of $601,204.80 and costs by the Circuit Court of Greene County. The judgment disposed of all issues between Plaintiff and Defendant, and finding no just cause for delay, the trial judge declared said judgment final. LF 146, Rule 74.01(b). (In addition, Defendant withdrew its Motion for Leave to File Third Party Petition on January 7, 2004. LF 6.) Notice of Appeal was filed January 13, 2004. LF 6 Because this matter does not involve any issues within the exclusive jurisdiction of the Missouri Supreme Court, it is within the general appellate jurisdiction of the Missouri Court of Appeals, Southern District, pursuant to Article V, § 3 of the Missouri Constitution. Following opinion by that court, the Supreme Court of Missouri granted transfer. Rule 83.04.

STATEMENT OF FACTS

Plaintiff Christian County Missouri, ("Plaintiff' or "County"), is organized and exists under Missouri Statutes. (LF 10, 14).[1] Jones is a Missouri limited partnership licensed as a securities dealer with thousands of offices nationwide. (LF 10, *Appellant's Brief before the Court of Appeals*, page 3) Jones markets itself as a provider of a broad range of financial products and services, including annuities, checking and savings, college savings, estate planning options, fixed income investments, customer loans, mutual funds, stocks and "a

variety of bank-like services." (LF 106) Jones also markets US treasury securities. (LF 107) Steven Askren was in charge of a Jones branch office at 2740 Glenstone in Springfield, Missouri in June of 1996. (LF 80, 35)

At all relevant times before and after June 19, 1996, the sole depositary[2] selected according to the bidding processes provided for county funds pursuant to §110.130 *et seq*. RSMo.[3] was Ozark Bank. The Defendant has not been selected as a depositary of County funds and was not a properly approved depositary at any relevant time. (LF 36, 51)

Gary Melton, the then County Treasurer, went to the Jones office at 2740 Glenstone in Springfield and discussed opening a "money market" account with Askren in order to obtain a higher rate of return on interest. (LF 35, 81) Melton told Askren that the funds that were being discussed as a deposit were County funds. (LF 32, 81) To open the new account, Askren provided a form establishing the Account as that of an "unincorporated association," rather than a government account. (LF 32, SLF 5) The form indicated "1 (number) individuals[sic]…have joined together to form an unincorporated association." (SLF 5, A2-A3) According to Askren, this unincorporated association form was used because he was told to use it by someone from the home office. (LF 32) He told that person he was opening an account for Christian County and that he was speaking with the treasurer in Askren's

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[1] Reference to the legal file or supplemental legal file is referred to herein as LF or SLF

[2] The word "depositary" is not a standard spelling, but is the spelling of the word used in Chapter 110 RSMo. The statutory spelling will be used throughout this brief.

[3] All references to statutes are to RSMo. 2000 unless otherwise noted.

office. (LF 32, SLF A1) Melton signed the form, opening the "unincorporated association" Account on June 21, 1996, and delivered a check drawn on County funds with the Ozark Bank in the sum of $650,000. (LF 36-37, 103 and SLF 2-3) This "unincorporated association" Account was characterized as a "full-service daily passport cash trust" account. (LF 101, 103) Funds deposited in the Account could be "withdrawn on demand." (LF 101-103) That the "unincorporated association" consisted of one member was confirmed by a Jones internal communication on June 24, 1996. (SLF 4) Jones had made no written bid to become a County depositary. (LF 90, 25)

During the conversation between Askren and Melton, Askren described how the Account would be "accessible." (LF 90) Melton was told he could call Askren's office and have funds moved to other accounts without the use of a check. (LF 90) There was also no discussion of a need for checks in order to disperse county funds. (LF 90)

The "unincorporated association" Account was initially opened under the name "Christian County Building Fund," but was changed to "CBF" on June 21, 1996. (LF 21, 22, 34) Changes were also made in the address from "attention Gary Melton, Treasurer," to simply "Gary Melton." (LF 34) None of the above matters were discussed with the County Commission prior to June 21, 1996. (LF 77) Indeed, at no time prior to July 10, 1996, did Askren have contact with any county official other than Melton. (LF 81)

The $650,000 check was received at the Ozark Bank on June 24, 1996. (LF 38) The face and back of the check did not disclose which Jones office was involved or the purpose of the check, having only the hand written notation "B Fun_[unreadable]" on the front and an endorsement to Jones' account at the Boatman's Bank on the back. (LF 38) When the

check was presented for payment at the Ozark Bank, bank officials contacted Joe Nelson, presiding commissioner. (LF 77)

Nelson attempted to contact one of the other two commissioners, but was unsuccessful. (LF 77) He met with Commissioner William Barnett, and the two went to the Prosecutor's Office. (LF 77) After obtaining legal counsel, Nelson advised the bank to let the check go through because of possible legal consequences of "whatever agreement Mr. Melton could have made with Edward Jones." (LF 78) The deposit was credited to the "unincorporated association" Account on June 25, 1996. (LF 24)[4] Between June 25 and July 10, the following monies were "wired" from the "unincorporated association" Account based on Melton's verbal directions:

July 2, 1996	Metropolitan National Bank	$350,000
July 3, 1996	Metropolitan National Bank	$250,000
July 10, 1996	Ozark Bank	$538.26
July 10, 1996	Ozark Bank	$24,955 (LF 24)
July 2, 1996	Fee for wiring funds	$15
July 3, 1996	Fee for wiring funds	$15

According to records maintained by Metropolitan National Bank, Gary Melton had an individual account on which only he could sign checks. (LF 96) The wire transfer from Jones of $350,000 on July 2 and $275,000 on July 3 are reflected in deposits to Melton's

[4] Actually, this information appears on an unnumbered page between LF 24 and LF 25. It appears as the Defendant's Answer to Interrogatory Number 7.

personal Metropolitan National Bank account. (LF 94, 95) Between July 2 and July 10, 1996, various debits and checks were deducted, leaving the balance in the Melton's individual Metropolitan National Bank account of $5.12. (LF 94). To reiterate, at no time prior to July 10, 1996, did Askren have contact with any county official other than Melton. (LF 81)

Of the $650,000 Melton delivered to Jones, the county was able to recover a total of $281,162.72. (LF 66-67) The balance of $368,837.28 remains unpaid. (LF 67)

Jones denied any liability for the balance of funds and did so in writing on February 2, 2000. According to Jones' letter of February 2, 2000, it refused any liability "for the illegal activity of Mr. Melton." (LF 39)

This action was filed March 8, 2000. (LF 2) Thereafter, on August 21, 2002 Plaintiff filed its Motion for Summary Judgment. (LF3) Defendant filed a response to that motion unsupported by any references to pleadings, affidavits or discovery and sought a delay of hearing said motion. (LF 3, 51-54) This response was not supplemented or amended, but Defendant filed its own Motions for Summary Judgment on March 24, 2003. (LF 5)

Thereafter, on September 11, 2003, the trial judge by letter advised counsel for both sides of his intent to enter Summary Judgment in favor of Plaintiff and requested the County's attorney to prepare the Judgment. (LF 5) The original Judgment was prepared and entered on September 23, 2003, set aside on September 29, 2003 at Defendant's request, and re-entered on December 8, 2003. From that Judgment, Jones appealed. (LF 5-6)

The Missouri Court of Appeals, Southern District issued its opinion on November 30, 2005, affirming the trial court. It concluded that despite Jones not being a bank:

> We can perceive no factual or legal reason why [Jones] did not accept those funds with notice of the law requiring that public funds be deposited in a properly chosen depositary, and that since it was not such a depositary it accepted them as a trustee *ex maleficio*.

Christian County v. Edward Jones, ___ S.W.3rd___, 2005 WL 3196419 * 6 (Mo. App. S.D. 2005.) The court further affirmed the award of prejudgment interest, noting that in conversion actions, interest is allowed from the date of conversion.

In rejecting the claim that the Plaintiff's judgment could only be based on a statutory theory and not conversion, the Court of Appeals pointed out that Jones liability, as pleaded and found by the trial court, was based on its status as a trustee *ex maleficio* and conversion, not on a theory of statutory liability. *Id.* at * 7. Finally the Court of Appeals rejected the claimed defenses of estoppel and waiver, because the former defense is not generally applicable to validate legally invalid acts of a public officers, and the latter was not pleaded. *Id.* at *9-11.

This Court thereafter granted transfer.

POINTS RELIED ON

I.

THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT FOR THE PLAINTIFF BECAUSE THE UNDISPUTED EVIDENCE SHOWS DEFENDANT UNLAWFULLY PURPORTED TO ACCEPT COUNTY FUNDS FOR DEPOSIT CONTRARY TO § 110.130 *et seq*. RSMo, IN THAT DEFENDANT DID NOT

SUBMIT A BID TO BECOME A LEGAL COUNTY DEPOSITARY, AND IS CHARGED WITH KNOWLEDGE OF THE STATUTES.

CASES

In re Cameron Trust Co., 51 S.W. 2d 1025 (Mo. 1932)

Fidelity and Deposit Co. of Maryland v. People's Bank, 44 F.2d 19 (8th Cir. 1930)

Marion County v. First Savings Bank of Palmyra, 80 S.W.2d 861 (Mo. 1935)

Harrison Township, Vernon County v. People's State Bank of Bronaugh, 46 S.W.2d 165 (Mo. 1932).

STATUTES

§110.130 RSMo.

§110.240 RSMo.

§110.010-.020 RSMo.

§110.140 RSMo.

§110.150 RSMo.

§ 432.070 RSMo.

CONSTITUTIONAL PROVISIONS

Mo. Const. Art. VI, § 23

II.

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT BASED ON COMMON LAW CONVERSION BECAUSE THE UNDISPUTED FACTS

ESTABLISHED THAT ON JUNE 25, 1996, WHEN COUNTY FUNDS WERE IN THE DEFENDANT'S POSSESSION AS TRUSTEE *EX MALEFICIO*, DEFENDANT APPLIED SAID FUNDS TO AN ACCOUNT IN THE NAME OF AN UNINCORPORATED ASSOCIATION AND THEREAFTER TRANSFERRED SAID FUNDS TO AN INDIVIDUAL ACCOUNT OF GARY MELTON ON JULY 2 AND JULY 3, 1996 IN THAT SUCH TRANSFERS WERE NOT LAWFUL UNDER § 110.130 et seq RSMo.

CASES

Fehrman v. Pfetzing, 917 S.W.2d 600 (Mo. App. E.D. 1996)

In re Cameron Trust Co., 51 S.W.2d 1025 (Mo. App. 1932)

State ex rel Gentry v. Page Banks, 14 S.W.2d 597 (Mo. 1929)

Citizens Bank of Appleton City v. Schapeler, 869 S.W.2d 120 (Mo. App. W.D. 1993)

STATUTES

§ 554.140 RSMo.

§ 110.170 RSMo.

§ 54.140 RSMo.

RULES

Mo. Sup. Ct. Rule 55.08

Mo. Sup. Ct. Rule 83.08

Mo. Sup. Ct. Rule 84.04

III.

THE TRIAL COURT DID NOT ERR IN AWARDING INTEREST FROM JUNE 21, 1996 AT 9 % PER ANNUM BECAUSE ON SAID DATE DEFENDANT CONVERTED $650,000 IN COUNTY FUNDS, OF WHICH $368,837.28 REMAINS UNACCOUNTED FOR, IN THAT IN CASES OF CONVERSION, INTEREST IS ALLOWED FROM THE DATE OF CONVERSION.

CASES

In re Cameron Trust Co., 51 S.W.2d 1025 (Mo. 1932)

Fidelity and Deposit Co. of Maryland v. People's Bank, 44 F.2d 19 (8th Cir. 1930)

Citizens Bank of Appleton City v. Schapeler, 869 S.W.2d 120 (Mo. App. W.D. 1993)

STATUTES

§110.240 RSMo.

§ 537.520 RSMo.

RULES

Mo. Sup. Ct. Rule 83.08

IV.

THE TRIAL COURT DID NOT ERR IN REFUSING TO CONSIDER DEFENDANT'S CLAIMED DEFENSE OF WAIVER AND ESTOPPEL BECAUSE THE UNDISPUTED FACTS SHOW THAT NO COUNTY OFFICIAL HAD LAWFUL AUTHORITY TO DEPOSIT FUNDS IN AN "UNINCORPORATED ASSOCIATION" ACCOUNT WITH

THE DEFENDANT IN THAT (1) THE ONLY LAWFUL METHOD OF BECOMING A COUNTY DEPOSITARY IS AS PROVIDED IN § 110.130 et seq AND DEFENDANT IS PRESUMED TO KNOW THE LAW AND MAY NOT REASONABLY RELY ON ANY STATEMENTS OF GARY MELTON OR THE FAILURE TO ACT BY OTHER COUNTY OFFICIALS SO AS TO CREATE AND ESTOPPEL, (2) THE UNDISPUTED EVIDENCE SHOWS NO OFFICIAL OTHER THAN MELTON WAS AWARE OF THE "UNINCORPORATED ASSOCIATION" ACCOUNT OR THE AGREEMENT OF MELTON WITH JONES REGARDING SAID ACCOUNT, (3) WAIVER IS NOT PLEADED OR IS ABANDONED AND IS THEREFORE NOT AVAILABLE, AND (4) SAID EQUITABLE DEFENSE IS NOT AVAILABLE TO ONE WHO DID NOT ACT EQUITABLY AND WHO ACTED ILLEGALLY.

CASES

In re Cameron Trust Co., 51 S.W.2d 1025 (Mo. 1932)

Donovan v. Kansas City, 175 S.W.2d 874 (Mo. banc 1943)

McDonald Special Road Dist. v. Pickett, 694 S.W.2d 273 (Mo. App. S.D. 1985)

Horizons West Properties v. Leachman, 548 S.W.2d 550 (Mo. banc 1977)

STATUTES

§110.270 RSMo.

§110.240 RSMo.

CONSTITUTIONAL PROVISIONS

Mo. Const. Art. IV, § 15

ARGUMENT

Summary of the Argument

Chapter 110 RSMo., entitled "Depositaries of Public Funds," includes numerous provisions related to selection of depositaries of public money. Specifically, § 110.130 provides that county depositaries must be selected by a bidding process. The statutory requirements are mandatory and failure to comply prevents title to funds deposited from passing out of the county's hands.

It is undisputed that Jones was not a lawful county depositary when it came into possession of a check drawn on county funds, drafted by Christian County Treasurer Gary Melton for the purpose of making a deposit. As a matter of law, Jones therefore held no lawful ownership in the funds but held the check and later the proceeds of the check as trustee *ex maleficio*. Moreover, because the county was entitled to immediate possession of its funds at all times, specifically at the time the check was delivered, at the time Jones opened the "unincorporated association" account and at the time Jones transferred the funds to the individual account of Gary Melton, Jones is liable for conversion for excluding the County from its right to ownership and possession of the funds.

Estoppel is not available to justify a void and illegal contract. The defense of waiver was not pleaded or supported by any evidence. Persons dealing with counties and county funds are charged with knowledge of statutory provisions relating to county depositaries. Since the deposit was illegal and utterly void as a matter of law, Jones could not have reasonably entered into an agreement in good faith reliance. Jones had not right to rely on any representation by Melton or any other public official made and no grounds to estop the

county from asserting its claim. Because Jones' employees knew these monies were county funds and still deposited the funds in an "unincorporated association" account and paid the funds out of that account without requiring a check to a personal account of Melton, it failed to act equitably and is therefore not entitled to equitable defenses.

Because the language of the statutes is plain and unambiguous, resort to rules of statutory construction is not permitted. Even if some ambiguity can be perceived, it would contort the purposes of the statute and the rules of construction beyond recognition to say that the statutory language, by providing that bids shall be received from a banking corporation or association, also authorizes by implication the deposit of county funds with any non-bank entity without bidding.

Finally, the law in Missouri clearly authorizes interest on claims for conversion not just from the date of demand for payment, but from the date of conversion. In this case, that is the date the Defendant placed the funds in the "unincorporated association account" or, at the latest, the date the funds were unlawfully transferred to individual accounts of Gary Melton.

Here, the factual allegations of Plaintiff's motion for summary judgment were supported by specific references to affidavits, pleadings and discovery. Defendant admitted some allegations and denied others, but filed no affidavits, pleadings or discovery and did not cite or refer to in said response refuting the facts stated in Plaintiff's Motion for Summary Judgment. The response was never supplemented or amended. As a result, the facts in Plaintiff's Motion for Summary Judgment stand undisputed.

I.

THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT FOR THE PLAINTIFF BECAUSE THE UNDISPUTED EVIDENCE SHOWS DEFENDANT UNLAWFULLY PURPORTED TO ACCEPT COUNTY FUNDS FOR DEPOSIT CONTRARY TO § 110.130 *et seq*. RSMo, IN THAT DEFENDANT DID NOT SUBMIT A BID TO BECOME A LEGAL COUNTY DEPOSITARY AND IS CHARGED WITH KNOWLEDGE OF THE STATUTES.

Standard of Review

This case comes to the Court as a summary judgment pursuant to Rule 74.04. The court reviews an award of summary judgment in the light most favorable to the party against whom judgment was entered. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Facts set forth by affidavits or otherwise in support of a motion for summary judgment are taken as true unless contradicted by the non-moving party's response and the non-movant is accorded the benefit of all reasonable inferences from the record. *Id.* Review is essentially de novo. *Id.* But failure to adhere to the text of Rule 74.04 or to unduly disfavor summary judgment is to rob the rule of it usefulness. More analysis is required than to merely disregard undisputed facts that do not support the non-moving party's theory of the case. Failure to adhere to Rule 74.04 or to indulge disfavor toward summary judgment robs the rule of its usefulness. *Id.*

Once a claimant makes a *prima facie* showing by pleadings, affidavits or discovery that there is no genuine dispute of material facts upon which the party has the burden of persuasion and there are no viable affirmative defenses, "an adverse party may not rest upon the mere allegations or denials of his pleading, but *by affidavits or as otherwise provided in*

this Rule 74.04, shall set forth specific facts showing that there is a genuine issue for trial." *ITT*, 854 S.W. 2d at 381 (emphasis in original); Rule 74.04(e). It is not the "truth" of the facts upon which the court focuses, but whether or not those facts are disputed. Whereas here, they are not, the facts are admitted for purposes of analyzing the summary judgment motion. *ITT*, 854 S.W.2d at 382.

Analysis

Illegality of the Deposit

Before reaching the precise issue raised in Jones' first point, some discussion of long established legal principles regarding county government and the deposit of county funds is necessary. Counties are a limited form of government, having no inherent powers. *Premium Standard Farms, Inc. v. Lincoln Tp. of Putnam County* 946 S.W.2d 234, 238 (Mo. banc 1997). A county "can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation-- not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied." *Id.* "No county...shall make any contract unless the same shall be within the scope of its powers or be expressly authorized by law...." 432.070 RSMo 2000.

The "scope of" a county's powers to deposit funds is set forth in detail in Chapter 110 RSMo. The deposit of county funds with a bank or securities dealer, such as Jones, without the security required by §110.010 RSMo. is also a violation of the constitutional prohibition on the lending of credit or the grant of public funds to a private association, corporation or

individual. Mo. Const. Art. VI, §23. When a local government steps out of the boundaries set down by constitution or statute, its acts are void. *Borron v Farrenkopf*, 5 S.W.3d 618, 620 (Mo. App. W.D. 1999)

With regard to deposit of county funds, Section 110.130 RSMo. *et seq*. or its predecessor provisions have been the law in Missouri on "County Depositaries" for more than a century. *See* Laws 1889, §3212. Courts have consistently held that these statutes are mandatory; when county funds are placed in a depositary without compliance with the statutes the normal debtor and creditor relationship between a bank and its depositor does not exist as such relationship may be created in one way only: by compliance with the statute. *In Re Cameron Trust Co*., 51 S.W.2d 1025, 1026 (Mo. 1932); *Marion County v. First Savings Bank of Palmyra*, 80 S.W.2d 861, 863 (Mo. 1935); *Harrison Township, Vernon County v. People's State Bank of Bronaugh*, 46 S.W.2d 165, 166 (Mo. banc 1932).

As was the case in *Cameron Trust*, the title to the funds here were in the County and its treasurer held them as trustee only. The treasurer had no authority to transfer title to the funds in any way except as provided by law. He was the custodian of the funds, but was not authorized by law to designate a depositary on his own. *In Re Cameron Trust Co*., 51 S.W.2d at 1027. Moreover, even the County Commissioners, as public officers and custodians of public money charged with the exercise of a duty in respect to the funds, have only limited powers with respect to the funds. *Marion County*, 80 S.W.2d at 863. "***All*** dealing with public officers and funds are charged with knowledge of the statutory provisions relating to county depositaries." *Id.* (Emphasis added). ***All*** would include securities dealers, loan sharks, pawn brokers and political cronies.

The entire premise of Jones' Point I is that some lawful method is authorized for designating a depositary of county funds other than that prescribed by §110.130 *et seq*. RSMo. That premise is flawed. Jones never had lawful authority to receive the check for deposit, to credit the funds to an "unincorporated association" account or to transfer the funds on the oral directive of Melton to Melton's personal account.

Jones Liability for Conversion as Trustee

Given the state of the law, what duties of Jones exist toward the County regarding the funds wrongfully deposited with Jones? The cases are utterly consistent in holding that the unauthorized depositary becomes a trustee *ex maleficio* of the County.[5] *Dobyns v. Bank of Ava*, 99 S.W.2d 495, 497 (Mo.App. 1936); *Marion County*, 80 S.W.2d at 865; *Cameron Trust Co*., 51 S.W.2d at 1027. The trustee *ex maleficio's* liability is absolute and "could only be relieved by restoring the funds to the county." *Fidelity and Deposit Co. of Maryland v. People's Bank*, 44 F.2d 19, 20 (8th Cir. 1930). As a trustee *ex maleficio*, Jones also lost any right to presume the county treasurer in withdrawing funds would make a proper disposition of them. *Id.* at 21. Jones cannot escape liability by transferring the County's property to a third party, but is directly liable for it "converted the trust property" in its possession. *Id.*

Jones Status As Securities Dealer Does Not Excuse Illegal Conduct

[5] "Trustee *ex maleficio*" is defined as a trustee from wrongdoing; the trustee of a trust arising by operation of law from a wrongful acquisition. *Lucas v. Central Missouri Trust Co*.,166 S.W.2d 1053, 1056, (Mo. 1942).

Jones seeks to avoid the clear holding of the cases by claiming it is not a bank. Jones argues that because it is not a bank, Melton's delivery of the check for deposit, the deposit of the funds in the "unincorporated association" Account with Jones and Jones subsequent transfers based on verbal directives of Melton were legally authorized. Conveniently overlooked in its analysis is the text of §110.240, which provides, "[N]o money belonging to the county shall be paid by ***any*** depositary, except upon checks of the county treasurer."(Emphasis added) Jones also resorts to canons of statutory construction to support its argument.

The primary rule of statutory construction is to ascertain the intent of the legislature from the language used and give effect to that intent if possible. *State ex rel. BP Products v. Ross*, 163 S.W.3d 922, 927 (Mo. banc 2005). The words of a statute are to be understood in their plain and ordinary meaning. *Id.* All canons of statutory construction are subordinate to the requirement that the court ascertain and apply a statute in a manner consistent with the legislative intent. *Williams v. National Cas. Co.* 132 S.W.3d 244, 249 (Mo.banc 2004) Applying the above principles to the provisions of Chapter 110 RSMo., there simply is no ambiguity that justifies resort to rules of construction to find the legislative intent.

In words that require no interpretive aids, the statutes provide that public funds of the county deposited in a banking institution acting as a legal depositary shall be secured in an amount not less than one hundred percent of the actual amount on deposit. §110.010-.020 RSMo. In equally unambiguous terms, §110.130 *et seq*. prescribes how a county must select a depositary and with whom it can contract to become a depositary. "[T]he county commission of each county … shall receive proposals from banking corporations and

associations at the county seat…." §110.130 RSMo. "Any banking corporation or association in the county desiring to bid shall deliver to the clerk of the commission… a sealed proposal…. Each bid shall be accompanied by a certified check for not less than one and one-half percent of the county revenue of the preceding year…." §110.140 RSMo. "The county commission, at noon on the first day of the May term in each odd-numbered year shall publicly open the bids… and shall select as the depositaries of all public funds of every kind and description… the banking corporation or association whose bids respectively made for one or more parts of the funds shall in the aggregate constitute the largest offer for payment of interest per annum for the funds…" §110.150 RSMo.

The unmistakably clear and wise legislative purpose of the statutes is to safeguard these funds and to protect them from reckless or corrupt public officials and irresponsible or unscrupulous persons with whom the funds might be deposited. *In re Cameron Trust Co.*, 51 S.W.2d at 1026. If the treasurer had the right to deposit the funds with any entity of his own choosing and the depositary had the right to use these funds without complying with the statutes, it "would destroy and nullify the protection the Legislature has placed about these funds." *Id*., 51 S.W.2d at 1027.

Jones argument stands both the purpose of the statues and the rules of construction on their heads. First, Jones argues that only a bank is identified as "liable" for the safe keeping of public money deposited with it, citing §110.050 RSMo. *Appellant's Brief*, p. 26. But Jones fails to acknowledge that banking corporations and associations are also the only entities identified authorized to submit proposals to become a depositary and to whom a depositary contract may be awarded. §110.130-.150 RSMo. A person or entity cannot

assume the status of a depositary if the law does not authorize it to become a depositary in the first instance.

Even if one imagines some ambiguity that permitted resorting to canons of construction, *expressio unus est exclusio alterius* does not aid Jones. The expression of one type of entity (banks) as authorized to be a county depositary excludes any authority for other entities (non-banks) to be depositaries. See Black's Law Dictionary, 7th Ed. 1999, p. 602, where the following example of the application of the canon is given after its definition, "[T]he rule that 'each citizen is entitled to vote' implies that noncitizens are not entitled to vote." Under Jones contorted application of the rule, because noncitizens are not mentioned, they could vote.

Jones also seeks solace in the rule of construction that related statues are "relevant to further clarify the meaning of a statute." *State ex rel. BP Products v. Ross,* 163 S.W.3d at 927. In *BP Products,* the Court relied on a "related statute" of limitations, §516.120(4) RSMo, to assist in construing §516.140 RSMo., another statute of limitations. This rule of construction is often referred to as the "*in pari materia* doctrine." *State ex rel. Director of Rev. v. Gaertner,* 32 S.W.3d 564, 566 (Mo. banc 2000). The doctrine has relation only to statutes dealing with the same subject matter. *State ex rel. Moore v. Weathers,* 396 S.W.2d 746, 749 (Mo.App.1965). It contorts the doctrine beyond all recognition to say that a statute relating to the incorporation of banks trumps statutes prescribing how and who counties may select as authorized depositaries. The county depositary law in Chapter 110 is not "related" to the statute authorizing the incorporation of banks. By the very terms of §362.010, the

definition of “bank” is only applicable “[w]hen used in this chapter [362 RSMo.]…” Thus the claim that the two statutes stand *in pari materia* is totally flawed

Assuming one applies Jones' strained and contorted application of these canons of construction and assuming that an entity that is not a "banking corporation" is excused from the bidding and security provisions of the county depositary law, the inquiry is not over. Section 110.130 *et seq*. identifies not just banking corporations. It also identifies a "banking association" as a type of entity that may bid for county funds. As noted above, the statutory definition of “bank” found in §362.010 is not the legislatively declared universal definition suggested by Jones. No clear definition of the term “banking association” can be found in Chapter 362 or elsewhere in the statutes. Bank is also defined in §400.1-201(4) as "any person engaged in the business of banking." The term "person" is defined to include an individual or an organization. §400.1-201(30) RSMo. 2000. Reference to standard dictionaries discloses that a "bank" is a “financial establishment for the deposit, loan, exchange or issue of money and for the transmission of funds,” and as “an institution for receiving, lending, exchanging and safeguarding money.” Black’s Law Dictionary, 7th Ed. 1999, p. 139; Random House Webster’s Unabridged Dictionary, 2nd Ed. 1999, p.164. None of these definitions require a “banking association” to be incorporated as a particular type of entity.

Jones' advertising discloses that they engage in a broad range of “bank-like services” including checking, mortgage loans and savings accounts. LF 106. In addition, Jones status as a limited partnership is most certainly an association of at least two or more persons.

§359.011(7) RSMo. (2000). Such an association that claims to provide “bank-like services” certainly looks, walks and quacks like a “banking association.”

Even assuming the strained conclusion that §110.130 *et seq.* does not apply to entities that do not qualify as "banks," then the Court must decide if Jones' conduct and representations qualify it as a "banking association." More importantly, Jones has failed to identify, as it must, some alternative statutory authority for a "securities dealer" to become a county depositary without violating the constitutional and statutory prohibitions previously noted. § 110.130 RSMo.(2000); § 432.070 (2000); Mo. Cont. Art. VI, § 23. Neither renegade county officials such as Melton nor Jones have any inherent authority to create their own alternative county depositary scheme. ***All,*** including Jones, are presumed to know and required to follow the law.

II.

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT BASED ON COMMON LAW CONVERSION BECAUSE THE UNDISPUTED FACTS ESTABLISHED THAT ON JUNE 25, 1996, WHEN A CHECK ON COUNTY FUNDS WAS PLACED IN THE DEFENDANT’S POSSESSION AS TRUSTEE *EX MALEFICIO*, DEFENDANT APPLIED SAID ITEM TO AN ACCOUNT IN THE NAME OF AN UNINCORPORATED ASSOCIATION AND THEREAFTER TRANSFERRED SAID FUNDS TO AN INDIVIDUAL ACCOUNT OF GARY MELTON ON JULY 2 AND JULY 3, 1996. IN THAT SUCH TRANSFERS WERE NOT LAWFUL UNDER § 110.130 et seq. RSMo.

Jones' Point II is a less than subtle attempt to assert issues not raised as a point on appeal before the Court of Appeals. *Compare* Point III, *Appellant's Brief before the Court of Appeals*, p.20. The point there claimed that the trial court erroneously based its summary judgment not on "a statutory theory of liability" as allegedly sought in the motion, "but on a theory of conversion." *Id.* In what is now Jones' Point II, the assertions are revised and expanded to include the claims that the trial court erred in the entry of summary judgment on a conversion claim because (1) the County failed to establish the elements of conversion, (2) no cause of action exits for conversion of money, (3) the County failed to plead conversion, and (4) Jones did not possess the funds on the date of demand. A fifth claim, though not asserted in Point II at all or before the Court of Appeals, is argued in the text, *i.e.*, that the County is responsible for the theft of the funds by Melton because he is its agent.

In essence, this is an entirely new and different point than was asserted before the Court of Appeals. Indeed, it is ***five new points relied on***. This plainly violates the prohibition of Rule 83.08 that substitute briefs "shall not alter the basis of any claim that was raised in the court of appeals." The point also arguably violates Rule 84.04(d) by asserting more than one claim of error in a single point. For those reasons, the court should not address the new claims. Nevertheless, Respondent will attempt to address the new point or points out of an abundance of caution.

Conversion Pleaded & Undisputed Facts Establish Right to Summary Judgment

Point II A, Jones claims the undisputed facts fail to support a claim of conversion. In Point II D it argues conversion was not pled. Both arguments are misplaced. Conversion was the

legal basis of the claim pleaded in the petition. LF 10-11. Conversion of County funds was also established by the undisputed facts.

The petition alleged that an account was opened with Jones, that Jones came into possession of county funds on or about June 21, 1996, that county funds were placed in the account, that the provisions of §110.130 *et seq*. RSMo. were not followed in opening the account, that Jones thus held the funds as trustee *ex maleficio,* that Jones has converted the funds and that a demand to return the funds had been refused. No complaint of insufficiency of the pleading appears in the amended answer and no such complaint was made in the points before the Court of Appeals. LF 14-15, *Appellant Brief before the Court of Appeals*, p. 8-9.

The elements of conversion are (1) plaintiff was the owner of the property or entitled to possession of it; (2) defendant took possession of the property with the intent to exercise some control over it; and (3) defendant thereby deprived plaintiff of the right to possession of the property. *Fehrman v. Pfetzing*, 917 S.W.2d 600, 602 (Mo.App. E.D. 1996). Here, the petition alleged all the "ultimate facts" necessary to support its conversion cause of action. A pleader is required to state only the ultimate facts and it is not necessary to plead the facts or circumstances by which the ultimate facts will be established. *Scheibel v. Hillis,* 531 S.W.2d 285, 290 (Mo. banc 1976).

It is undisputed that at the time of Jones' transactions with Melton, the $650,000 represented by the check belonged to the County. LF 38 It is undisputed that Jones' agent took possession of it, and exercised control by negotiating the check. LF 38, 103. It is further undisputed that Jones did not comply with Chapter 110 to become a County

depositary. Thus when Jones received the check it had no rights other than that of a trustee *ex maleficio* and any act, other than returning the check to the county, amounted to conversion. But that was not the last act of conversion of the county funds. Jones Agent then deposited it first in the "unincorporated association" Account created by Jones. About ten days later, Jones, without requiring a check, transferred $625,000 of the county funds to Melton's individual account at Metropolitan National Bank. LF 92, 93. Finally it is undisputed that by the above conduct, the County has been deprived of the right to possession of the money, or at least $368,837.28 thereof since June 25, 1996. LF 67.

To be sure, Chapter 110 is relevant to the question of whether ownership of the check or its proceeds ever passed to Jones. As a matter of law, the Account Jones opened, admittedly without advertising for bids and without any security, was "utterly void and all parties thereto are parties to an illegal contract." *In re Cameron Trust*, 51 S.W.2d at 1026. The normal relationship of debtor and creditor never existed. Thus Jones never acquired any ownership in the check or its proceeds, but held them merely as trustee *ex maleficio*. *Id.* at 1027.

This is not a case where Jones was a mere debtor to the County. It held the check and later the county funds in trust. It is hornbook law that a trustee is liable in conversion "regardless of who ultimately receives the benefit of the conversion." C.J.S. Vol 90A, Trusts, §376 p. 120. One aiding a trustee, like Melton, in making the conversion of trust property, with knowledge thereof is also liable for conversion. *Id*. at p. 121. Askren and others at Jones knew from the outset that the check and the funds it represented did not belong to Melton. Jones gave Melton every assistance possible in converting the funds to

his personal use, even to the point of suggesting that "unincorporated association" account form be used and informing Melton he could "wire" transfer funds by oral directives, which Melton did. LF 90. When a fund is placed in the custody of another for a specified purpose, its diversion for other than the specified purpose is conversion. *Lappe and Associates, Inc. v. Palmen,* 811 S.W.2d 468, 471 (Mo. App. E.D. 1991). The County's claim for conversion against Jones was pleaded and all facts necessary to establish conversion are undisputed on the record here.

Melton Was Not an Agent of the County in Stealing County Funds

As a matter of law, Melton was not authorized under principles of agency to open the legally unauthorized "unincorporated association" Account for the County. All are presumed to know legal limits on a public official's authority. Certainly a sophisticated investment broker, such a Jones, must be held to know the statutory limits on a county officials power over public funds . A county treasurer is authorized to separate and divide funds that come into his hands "in compliance with the provision of law, and to pay out revenues on warrants issued by the commission" and perform other duties prescribed in chapters 136 and 154 "in the express manner provided and directed." §54.140 RSMo.

A county treasurer has no lawful authority to select the depositary of county funds, with a narrow exception in §110.270, which is inapplicable here. It certainly does not take a legal scholar to know (1) that a county treasurer has no authority to open a county account in the name of an unincorporated association consisting of one member or (2) that he has no lawful authority to transfer county funds to his personal account without even writing a check. Melton could not legally be an agent for these purposes. Jones' active participation

in these transactions is only further evidence that it cooperated and aided in the theft. Jones is presumed to know that Melton's acts exceeded the scope of any agency permitted by law.

A Check or Money Subject to a Trust Can Be Converted

As one of its backup arguments, Point II C, Jones claims there is no cause of action for conversion of money, though it concedes money may be an appropriate subject of conversion when it can be described or identified as a specific chattel. When Jones took the check from Melton to deposit in the "unincorporated association" Account, the money had not been co-mingled with other funds. Only by the illegal acts of Jones did the funds become commingled and only by illegal transfers was the fund depleted.

At all times while in the possession of Jones, the fund retained its identity. Money can be an appropriate subject of conversion "when it can be described or identified as a specific chattel." *In re Estate of Boatright*, 88 S.W.3d 500, 506 (Mo.App. S.D. 2002). Conversion may lie to recover the value of funds held by a custodian who holds them for a specific purpose but diverts them from that purpose. *Deck v. Bird*, 810 S.W.2d 728, 729 (Mo. App. E.D. 1988). Co-mingling of the trust funds by the trustee *ex maleficio* with other funds in its hand does not eliminate the liability of the trustee for conversion. "[I]f a trust fund is proved to have been deposited in mass, and wrongfully and illegally mingled" with other funds in the hands of the trustee, even though indistinguishable, it may be recovered from the trustee "to the amount of the converted fund." *State ex rel Gentry v. Page*, 14 S.W.2d 597, 599 (Mo. 1929). Also a check, such as the one delivered to Jones, and the unauthorized deposit of it to the Account of a previously unknown "unincorporated

association" consisting of one member, is a proper subject of an action for conversion. *Atlas Sec. Services, Inc. v. Git-N-Go,* 728 S.W.2d 727, 730-31 (Mo. App. S.D. 1987).

Finally, Jones claims it did not "divert the County's funds for its own purposes." *Appellant Substitute Brief,* p. 42. But evidence of conversion does not depend on proof that Jones was unjustly enriched, only that there was an unauthorized assumption of the right to ownership to the exclusion of the true owner's rights. *Deck v. Bird*, 810 S.W.2d at 729 . In any event, Jones full cooperation with Melton in placing the funds in the unauthorized Account was obviously for Jones "own purposes" of acquiring a new and quite large account.

Date of Conversion and Date of Demand

Jones' argument II E confuses the date of the demand letter to Jones with the date of the conversion of the money. The conversion occurred on June 25 but no later than July 2 and 3, 1996. To be sure, a demand for return of the possession of the property is sometimes required to state a cause of action for conversion. Here the demand was pleaded (LF 11) and such demand is admitted in the undisputed facts. (LF 19, 53) But damages are determined and interest runs from the date of the conversion, not the date of demand. *Citizens Bank of Appleton City,* 869 S.W.2d at 130.

III.

THE TRIAL COURT DID NOT ERR IN AWARDING INTEREST FROM JUNE 21, 1996 AT 9 % PER ANNUM BECAUSE ON SAID DATE DEFENDANT CONVERTED $650,000 IN COUNTY FUNDS, OF WHICH $368,837.28 REMAINS UNACCOUNTED FOR, IN THAT IN CASES OF CONVERSION, INTEREST IS ALLOWED FROM THE DATE OF CONVERSION.

In Jones' Point III of its substitute brief, Jones again alters the claim it made before the Court of Appeals, there as Point II. See *Appellant's Brief before the Court of Appeals*, p. 18. Below it claimed that §110.130 *et seq*. RSMo. does not provide for prejudgment interest and Plaintiff's claim was statutory on which interest was not allowed unless expressly provided. Jones has now evolved its claim into three different claims. Jones now claims that the County is not entitled to prejudgment interest because: (1) it did not act improperly under §110.130 *et seq*., did not convert funds, and become a trustee *ex maleficio*; (2) §110.130 *et seq*. does not provide for prejudgment interest and no other statute allows prejudgment interest; and (3) that no prejudgment interest is allowed under common law conversion. In addition to its new "points," Jones argument weaves in other claims that were not raised in its Court of Appeals brief. Though Point III and the argument under it plainly violate the Rule 83.08(b) prohibition on altering the "basis of any claim raised in the court of appeals" and should be disregarded or stricken, the County will attempt to address each.

Undisputed Facts Establish Claim of Conversion

Under Point II , the County discusses at length how the pleadings and undisputed facts establish that, contrary to the clear terms of §110.130 *et seq*. prescribing how to establish an authorized county account, (1) an unauthorized check was placed in the hands of Jones' agent, (2) that the agent knew the check was written on county funds, (3) that the proceeds of the check were deposited in an Account in the name of an unknown "unincorporated association" called CBF, consisting of one member, Gary Melton, (4) that on Melton's verbal directive, Jones agent wire transferred $625,000 of the funds to Gary Melton's personal account, and (5) that thereafter a demand was made to refund the balance due the County.

A Contract of deposit made without advertising for bids is utterly void and all parties thereto are parties to an illegal contract. *In re Cameron Trust*, 51 S.W.2d at 1026. As a matter of law, one receiving county funds for deposit who is not the legal county depositary becomes a trustee *ex maleficio*, and does not escape liability by showing it has disposed of the trust property, but is "directly liable, for it has converted the trust property." *See Fidelity and Deposit Co. of Maryland v. People's Bank*, 44 F.2d at 20-21. Such absolute liability can only be relieved by returning the funds to the County. *Id*.

In a Conversion Action Interest Allowed From Date of Conversion

Where funds are placed in the custody of another and are used for other than the specified purpose, the holder of the funds is liable in conversion. *Citizens Bank of Appleton City v. Schapeler*, 869 S.W.2d 120, 130 (Mo. App. W.D. 1993). The measure of damages in such cases is the reasonable market value of the property at the time of conversion and, to allow full indemnity, interest is allowed in conversion cases on the value of the converted property from the date of its conversion. *Id*.

As conceded by Jones' substitute brief, §537.520 RSMo. (2000) authorizes interest from the date of conversion. Independent of that statute the Supreme Court of Missouri has long held that damages in the nature of interest are allowable in actions for conversion from the date of conversion, and enactment of the statute was merely the enactment of the pre-existing common law. *Independence Flying Service, Inc. v. Ailshire*, 409 S.W.2d 628, 632 (Mo. 1966). In that case, ***tried without a jury***, the Court held it error for the trial judge to fail to award prejudgment interest, but since the defendant acted in "good faith," the Court

limited prejudgment interest to the date of the demand rather than the date of the conversion.[6] *Id*.

Here, because of defendant's conduct in failing to even colorably comply with §110.130 *et seq*., crediting the funds to the "unincorporated association" account and transferring the funds to the personal account of Melton, it has not demonstrated the kind of "good faith" that might justify any such relief. An unlawful deposit "contract [of county funds] could not be entered into in good faith." *In re Cameron Trust*, 51 S.W.2d at 1026. The trial judge, having all the undisputed facts before him, "saw fit" (*see* §537. 520) to award interest from the date of the conversion. There is no basis for this Court to modify the trial court's ruling.

The cases and statutes cited by Jones not involving conversion claims are inapposite. *See* §§408.020 RSMo. (actions on contracts and accounts), 408.040.2 RSMo.(actions for torts in general); *Ritter Landscaping, Inc. v. Meeks*, 950 S.W.2d 495 (Mo. App. E.D. 1997) (action for negligence); *Pediatric Associates, Inc. v. Charles L. Crane Agency Co.*, 21 S.W.3d 884 (Mo. App. E.D. 2000) (action for negligence and breach of fiduciary duty).

Defendant misapprehends the nature of the cause of action for conversion. This is not a claim or remedy authorized by statute or a mere negligence claim, but is a conversion action based on funds of the County that fell into Jones possession as a result of an illegal issuance of a check to Jones and a void deposit agreement. Chapter 110 contains no civil

[6] A summary judgment entered upon undisputed facts is, for all practical purposes, indistinguishable from a case tried to the court without a jury.

remedy for violation of its terms. It is no different than if Jones had received the County's money knowing it had been stolen and placed it in the account of the thief. The claim to recover the funds is not a statutory action under any code, but a common law action for conversion. As such, interest is permissible from the date of the conversion. The undisputed facts show that date to be June 21, 1996, the date the county money was delivered to Jones for placement in the "unincorporated association" Account and no later than July 2 and 3, 1996, when Jones clearly violated the provisions of §110.240 by paying out $625,000 of county funds on the verbal directive of Melton and without requiring a check. LF 38, 94, 95, 103, SLF 2-3.

IV.

THE TRIAL COURT DID NOT ERR IN REFUSING TO CONSIDER DEFENDANT'S CLAIMED DEFENSES OF WAIVER AND ESTOPPEL BECAUSE THE UNDISPUTED FACTS SHOW THAT NO COUNTY OFFICIAL HAD LAWFUL AUTHORITY TO DEPOSIT FUNDS IN AN "UNINCORPORATED ASSOCIATION" ACCOUNT WITH THE DEFENDANT IN THAT (1) THE ONLY LAWFUL METHOD OF BECOMING A COUNTY DEPOSITARY IS AS PROVIDED IN § 110.130 et seq AND DEFENDANT IS PRESUMED TO KNOW THE LAW AND MAY NOT REASONABLY RELY ON ANY STATEMENTS OF GARY MELTON OR THE FAILURE TO ACT BY OTHER COUNTY OFFICIALS SO AS TO CREATE AND ESTOPPEL, (2) THE UNDISPUTED EVIDENCE SHOWS NO OFFICIAL OTHER THAN MELTON WAS AWARE OF THE "UNINCORPORATED ASSOCIATION" ACCOUNT OR THE AGREEMENT OF MELTON WITH JONES REGARDING SAID

ACCOUNT, (3) WAIVER WAS NOT PLEADED OR WAS ABANDONED AND IS THEREFORE NOT AVAILABLE, AND (4) SAID EQUITABLE DEFENSES ARE NOT AVAILABLE TO ONE WHO DID NOT ACT EQUITABLY AND WHO ACTED ILLEGALLY.

Jones' arguments regarding waiver and estoppel, like so much else in its brief, are a verbal slight of hand. They rest both on the misunderstanding and the misapplication of the relevant law and facts. First, Jones cannot use the defense of waiver because it was abandoned and not pled at the trial court. Its claim that the parties briefed and argued waiver below is, at best, a creative interpretation of the facts. Estoppel is also unavailable to Jones. Under the circumstances present in this case, estoppel cannot be used against a public entity by someone like Jones, who assisted a renegade officer in stealing the public's money.

Waiver Not Pleaded and Abandoned

At the outset, it must be noted that Jones has admitted that its First Amended Answer does not state the defense of waiver , but asserts its initial Response to the Petition did state the defense. LF 121. "Once an amended pleading is filed, any prior pleadings not referred to or incorporated into the new pleading are considered abandoned and receive no further consideration in the case for any purpose." *Scott v. Clanton,* 113 S.W.3d 207, 213 (Mo. App. S.D. 2003); *see also State ex rel. Crowder v. Dandurand,* 970 S.W.2d 340, 342 (Mo. banc 1998). The abandoned pleading becomes a mere "scrap of paper" so far as the case is concerned. *Scott,* 113 S.W.3d at 213.

Rule 55.08 of the Missouri Rules of Court specifically requires that any defense must be asserted in a party's answer. It was not. Jones' arguments to the contrary rest on what

may be charitably called a liberal reading of the record. Jones claims the parties briefed and argued waiver before the trial court and that the trial court also ruled on the issue. *Substitute Brief of Appellant,* p. 52. The passages cited by Jones are actually where the County points that "[t]he defense of waiver is not asserted or even mentioned in" the answer to the First Amended Petition and where the trial court simply holds that waiver is "inapplicable." LF 113, 146. Jones' argument cannot alter the only fact relevant on the issue of waiver: the defense of waiver was not plead in Jones' answer to the First Amended Petition. LF 14-15. While in no way conceding that waiver is now in the case at all, argument below will address how waiver provides no defense for Jones, even assuming it was properly raised.

Waiver

Even if waiver had been asserted as a defense, it is not applicable. The doctrine of waiver, which is disfavored in the law and rarely applicable, requires the "intentional relinquishment of a known right." *Shahan v. Shahan*, 988 S.W.2d 529, 534 (Mo.banc 1999). In order for waiver to exist, the intent to relinquish a claim must be directly expressed or "clearly and unequivocally" shown by conduct. *Id.* Here, the record establishes that no one intentionally relinquished a known right, because ***no*** county official, except Gary Melton, had any idea regarding the details of the transaction with Jones. No county official had a "known right" to approve Jones' and Melton's conduct.

Jones' claim to the contrary rest on a simplistic understanding of the facts of the case. Jones argues that county officials should have known that opening an "Edward Jones account ***in another county***" was unlawful. First, there is no evidence county officials knew the check was for opening an account, much less that it was for opening an account with an

Edward Jones office outside of the county. The two county commissioners only knew that a check had been delivered to Jones by Melton. LF 38. There was no indication on the check of which one of Jones' thousands of offices nationwide received the check. LF 38. More importantly, for all the county officials knew, the check could have been for a legitimate purpose. State law authorizes county treasurers to purchase U.S. government securities. §110.270 RSMo. Jones sells U.S. Treasury Securities. LF 107.

It is telling that the only case Jones cites as part of its waiver argument, *Shahan v. Shahan,* 988 S.W.2d 529 (Mo. banc 1999), only stands for the general definition of waiver and does not involve a claim of waiver asserted against a public entity. No case law exists allowing waiver to be successfully used against a public entity under the circumstances that exist here. The case cited by Jones for this proposition in their brief before the Court of Appeals, *Morgan v. City of Rolla*, has been abandoned by it, apparently in acknowledgement of its inapplicability. *Appellant's Brief before Court of Appeals,* p. 26.

This is clearly not a claim of waiver as occurred in *Morgan,* 947 S.W.2d 837 (Mo App S.D. 1997). There a city was held to have waived the a landowners' compliance with its ordinance prohibiting providing sewer service outside the city limits by entering into a contract where the landowner outside the city conveying an easement over property outside the city for a city sewer main in consideration of the future right to connect with the city sewer main. *Id*. at 840 Of course a city council may waive enforcement of its own ordinance. But had a state statute or the constitution contained a prohibition against the city providing sewer service outside the city, the city officials would have no authority or right to waive such prohibition. To do so would permit renegade public officials to "nullify the

protection the Legislature has placed about these funds." *In re Cameron Trust,* 51 S.W.2d at 1027.

Even if they had known all that Jones and Melton were up to, the county officials had no lawful authority to permit the illegal transfer of funds into the unlawful account with Jones. If county officials are powerless to pass title to public funds except as provided by law, it is equally true they cannot voluntarily waive that requirement of the law, including those relating to county depositaries because officials have no "known right" to illegally relinquish title. *See, Marion County,* 80 S.W.2d. at 863. The act of authorizing the transfer to the "unincorporated association" Account would have itself been an illegal act that could not have passed title to the funds. *See, Howard County,* 149 S.W.2d. at 844 (Mo. App. 1941). The funds were not the personal funds of any county official or of an "unincorporated association," but funds of the County, a fact know to Jones' representative when the check was given to him. LF 32.

The county commissioners had several legitimate reasons not to stop payment on the check and therefore its actions cannot be characterized as "intentionally relinquishing" the county's rights against Jones. First, as mentioned earlier, the county treasurer could have been lawfully purchasing government securities from Jones. By stopping payment on the check, something that is not even clear the commissioners had the power to do, they might have been interfering with a lawful and necessary transaction for the county. Second, simply stopping payment on the check would not have discharged the county's liability on it to Jones, as the drawer of a check is liable for its face value at the time the check is dishonored. See, § 400.3-402 RSMo. (2000); § 400.3-414 RSMo. (2000).

Finally, counties act only through their records. *Missouri-Kansas Chemical Co. v. Christian County*, 180 S.W.2d. 735, 736 (Mo. 1944); *State ex rel. Pettis County v. Sloan*, 643 S.W.2d. 618, 621 (Mo.App. W.D. 1982). Individual county commissioners do not have the power to act for or bind the county in any way. *Pettis County*, 643 S.W.2d. at 621. Thus, even though Joe Nelson was presiding commissioner of the county at the time the check was presented to Ozark Bank, he did not have the power by his actions to waive the county's rights. *See, e.g., Kansas-Missouri Chemical Co.,* 180 S.W.2d. at 736. The only way the county could have been bound or waived any of its rights with regard to the check would have been to take specific action, as a whole commission, on the record. *Pettis County*, 643 S.W.2d. at 620-21. There simply are no records of the county commission waiving any known rights that it had against Jones or Gary Melton.

Estoppel

Turning to the one pleaded defense, estoppel, the clear law since at least 1932 has been that the statutes requiring a public entity to select a depositary are mandatory and must be complied with in all respects. *In re Cameron Trust*, 51 S.W.2d at 1026. In order to accept Jones' argument that estoppel is applicable here, this Court would have to overrule seventy-five years of settled precedent, including many rulings of this Court itself. Two distinct rules are applicable when determining if estoppel may be applied against a public entity. The first applies when there is an "irregular exercise" of a power by a public entity. *Donovan v. Kansas City*, 175 S.W.2d 874, 880-881 (Mo. banc 1943) In such instances, estoppel is not favored and rarely applies to acts of a governmental body. *Bailey v. City of Goodman*, 69 S.W.3d 154, 157 (Mo. App. S.D. 2002) (Where the city had previously

supplied water service to a customer, city held not estopped to terminate such service.)

The second rule, and the one applicable here, occurs where there is a "total absence or want of such power" by the public officers involved. *Donovan*, 175 S.W.2d at 881. Estoppel may not be applied "under a contract which is void." *Id.* In the case of a void contract, "no estoppel can arise in the case of one who has knowingly assisted or agreed to assist the public body in the illegal exercise of its power." *Id.*

> Vain and futile would Constitutions and statute and charter be, if any officer could follow them only when he saw fit. If by estoppel such salutary provisions enacted with such wise foresight as checks upon extravagance and dishonesty, can be utterly abrogated at will by any officer, such provisions then subserve no purpose and the public corporation has no earthly protection against greed or graft The doctrine of estoppel is not generally applicable against a governmental body…. Equitable estoppel is impotent to purge transactions of the fatal infirmity of being in violation of law. *Id.*

See also *McDonald Special Road Dist. v. Pickett*, 694 S.W.2d 273, 277 (Mo. App. S.D. 1985)(where all commissioners had agreed to close one public road and open another contrary to the method authorized by statute, trial court's judgment in reliance on doctrine of estoppel was reversed outright.) Jones errs in assuming that the general principles of estoppel between private parties apply when one of the parties involved is a public entity. The case cited by Jones as an explanation of when estoppel applies, *Doe v. O'Connell*, 146

S.W.3rd 1 (Mo. App. E.D. 2004), deals with a tort claim for sexual abuse against a Roman Catholic bishop, not with an estoppel claim made against a public entity.

Specifically referring to *In re North Missouri Trust Co*., relied on by Jones to support its estoppel claim, the court in *In re Cameron Trust* said, "Whatever may be said of the ultimate result in [*In re North Missouri Trust*], we ***disapprove the holding*** that any legal contract can be entered into by a school board in the designation of a depository for school funds unless the provisions of the statute are complied with with reference to advertising for bids." 51 S.W.2d at 1026 (Emphasis added) The court went on to say, "Such contract made, without advertising for bids, is utterly void, and all parties thereto are parties to an illegal contract, and such contract could not be entered into in good faith." *Id*. The reason there can be no good faith is that the treasurer of a public entity is a trustee of limited power under the statutes, having no authority to transfer funds except as provided in the statutes. Everyone dealing with public officials is "charged with knowledge of these statutes." *Id*. 1026-1027.

The effect of the *In re Cameron Trust* in 1932 and the *Marion County* decision in 1935 was to directly overrule *In re North Missouri Trust*, a 1931 case and, by implication, overrule the even earlier case of *Cole County v. Central Missouri Trust Co*., 257 S.W. 744 (Mo. 1924) upon which Jones relies. Any lingering doubt that the holding regarding estoppel *In re North Missouri Trust* was overruled was made clear in the subsequent 1943 *en banc* ruling by the Missouri Supreme Court in *Donovan, supra*.

The premise of Jones argument is that even though no statutory authority existed for it to be a depositary of County funds, it had a right to rely on Melton's representations and commissioner Nelson's failure to stop payment on the check. The premise is flawed. Where

no statutory authority exists for official's representation, a person has no right to rely on statements contrary to the laws of this state. *Horizons West Properties v. Leachman*, 548 S.W.2d 550, 553-554 (Mo. banc 1977). An estoppel against a public entity must be based upon action taken upon ***reasonable reliance***. *B & D Inv. Co., Inc. v. Schneider*, 646 S.W.2d 759, 764 (Mo. banc 1983) Since Jones is charged with knowledge of the statutes establishing that neither Melton nor the County commission had authority to deposit county funds, except as provided by those statutes, Jones could not reasonably rely on any statements that were contrary to those statutes. *Donovan*, 175 S.W.2d at 881.

Jones' argument that Melton's actions could be presumed valid by Jones is without support. The case cited by Jones, *Blackburn v. Mackey*, 131 S.W.3d 392 (Mo. App. W.D. 2004) itself undercuts Jones' claim. While it is true the court recognized a presumption that "everything done by an officer in connection with the performance of an official act …is legally and rightfully done," the court went on to state that the presumption only applies "absent proof to the contrary" and is refuted by evidence the officer acted wrongly. *Id.* at 398. The case also illustrates another important limitation of the presumption: it only applies in situations where the question is about whether or not a certain act that was required to occurred did or whether acts occurred in the required order or not. *Id.*; *Conner v. Herd*, 452 S.W.2d 272, 275-276 (Mo. App. 1970) (regarding whether or not a zoning board's order was properly signed).

More importantly, the presumption is not applicable to Melton's actions. The presumption cannot be indulged where the facts upon which the official acted are before the Court. *State ex rel. De Weese v. Morris*, 221 S.W.2d 206, 208-209 (Mo. 1949). Here, all of

Melton's actions are before the Court. The record establish that he gave Jones a check for county money to open an account in the name of an unincorporated association consisting of just one member, himself. LF 32, 38, 103; SLF 1, 2-4. Jones' agent told Melton he could move funds out of the account by wire transfer, which Melton in fact did and stole $368,837.28 of the county's money that has never been recovered. LF 66-67, 90. The record also firmly establishes that Jones was not a properly selected county depositary and had not bid to become one. LF 36, 51. Under the circumstance above, any presumption Melton acted correctly is both ludicrous and rebutted.

Only in cases where the public officer had discretion to act or to not act in a particular way has estoppel been applied and then only rarely. *State ex rel. Southland Corporation v. City of Woodland Terrace*, 599 S.W.2d 529 (Mo App. E.D. 1980) But here there was no discretion for Melton or the commissioners to make Jones a depositary by some alternative plan than that provided by law. One dealing with a county government, as was Jones in this case, must take notice of the limitations on the power and authority of the representative with whom he deals. *Id.* Thus estoppel cannot apply.

Jones also relies on *Cole County v. Central Missouri Trust Co*., 257 S.W.2d 774 (Mo. 1924). Understandably, Jones fails to analyze the facts or law disclosed in that case. That action involved only a claim for interest a county asserted was due under an illegal deposit of county funds. *Id*. at 774. A divided court noted that although irregularities appeared in the letting of bids, the bank paid the county 4.75 percent on certain time certificates issued to the county by the bank, more than double the 2.15 percent prevailing rate on daily balances at the time, so that the arrangement was "very much to the advantage" of the county. *Id.* at 776

Moreover, the county had retained the benefits of the illegal deposit. The court noted that the county was not merely requesting to be put in *status quo*, as is the case here. *Id.* at 779. The county, having received and retained the benefit of an illegal contract far in excess of what it would have received by proceeding according to the statute, was thereby estopped to claim additional benefit of the illegal contract. *Id.* at 779. That simply did not occur here.

In this case, the illegal deposit contract did not at all benefit the County, as it has neither received a benefit nor is the County insisting on enforcing an illegal contract of deposit as was the case in *Cole County*. Rather, the County is requesting that the parties be put in the *status quo* at the time of the illegal contract. Thus *Cole County* is distinguishable from this case, if not overruled based on the later cases of *In re Cameron Trust* and *Donovan*.

Even if the court should choose not to follow the most recent precedent rejecting the defense of estoppel for the unauthorized and unlawful acts of county officials, estoppel is not applicable for other reasons. Contrary to Jones claim that the commissioners were aware of the account, Jones' agent did not contact commissioners Nelson and Barnett regarding the "unincorporated association" Account prior to July 10, 1996, (LF 81) by which time the Account had been dissipated by the conduct of Jones agent and Melton. Though the commissioners knew a check had been delivered to Jones by Melton they had no reason to believe it was for an illegal purpose. The face and back of check did not explain what the check was for, it did not disclose that an Account was opened, that the Account was opened in the name of an "unincorporated association," the Account number or in which of Jones' thousands of branch offices the Account might be located.

On its face, the check may have been written for a valid purpose. For example, it is lawful, when funds are determined to be not needed for current operations, for such funds may be placed in obligations of the United States Government, provided the purchases are "in the best interest of the county as determined by the county treasurer." §110.270 RSMo. Similarly, the Missouri Constitution provides that the State Treasurer may invest in U.S. government securities under certain conditions. Mo. Const. Art. IV, §15. Section 110.270 makes these same U.S. government securities available to county treasurers. Among other financial services, Jones sells U.S. Treasury Securities that are "direct obligations of the U.S. Government." LF 107. This power to invest funds by the treasurer is in addition to investment authority otherwise granted a county by law. §110.270 RSMo. Unfortunately for the County, that was not the purchase that Melton had made.

In addition, the commissioners were not shown to be "aware" that funds could or would be withdrawn by the verbal directive of Melton, rather than by check as required by statute. See §110.240 RSMo. In sum, the mere fact that Nelson told the bank to pay a check to Jones is not a representation of any fact upon which Jones could claim estoppel, either when Jones deposited the check in the "unincorporated association" Account or when it withdrew the money at the verbal direction of Melton.

To be sure Melton was an active participant with Jones in the illegal scheme to relieve the County of its funds. But the means to accomplish the plan were suggested, facilitated and accomplished by Jones. It was Jones' agent, not Melton, who suggested the Account be opened in the name of an "unincorporated association." LF 32. It was Jones agent who explained how the funds could be accessed by a wire transfer, rather than a check. LF 90. It

was Jones agent who represented that "CBF" was an "unincorporated association" consisting of one person, Gary Melton. LF 32, SLF 2-7. And it was Jones agent who transferred $625,000 by wire transfer out of the "unincorporated association" Account to Melton's individual account. LF 24. (Defendant's Answer to Interrogatory 7). Nothing in the record suggests that either Melton or any other county official represented that the he could legally create an "unincorporated association" Account or dispose of the County funds in the manner in which it was done. As previously noted, a predicate of estoppel is ***reasonable reliance*** on a ***representation of fact*** by the party asserting the defense. The County commissioners never made any representation to Jones. Melton said nothing that misled Jones into believing it was a legal County depositary or that Jones could legally disgorge County funds without checks. The only thing that is apparent from the record is that, regardless of Jones full knowledge and full corporation in all of Melton's illegal conduct, Jones believes it is not responsible for Melton's illegal actions.

CONCLUSION

Plaintiff respectfully submits that there is no genuine dispute that Defendant, through its agent, received a check on county funds for $650,000, Jones agent knew the check to be County funds, he deposited those funds in an "unincorporated association" Account, and thereafter wire transferred $625,000 of said funds to an individual account of Gary Melton without requiring a check. It is further undisputed that Jones did not bid to become a County depositary and could not legally be a depositary of County funds. As a result of the transactions, Jones possession of said funds was merely as a trustee *ex maleficio*, Jones having no legal authority to transfer funds except to return them to the County. Further

undisputed is that despite the County's demand for repayment of its funds, the County has been deprived of the funds $368,837.28 since June of 1996. Finally undisputed is that Jones made demand for return of the funds.

As a matter of law, the undisputed facts establish that Jones converted county funds. Interest then is permissible from the date of the conversion. No county official could legally deposit funds in the illegal "unincorporated association" Account or withdraw the funds from without a check signed by the treasurer under Chapter 110 RSMo. Jones is charged with knowledge of the statutes regarding county depositaries; consequently, the defense of estoppel is not valid. For the same reason, the unpleaded or abandoned defenses of waiver and laches fail.

Respectfully Submitted,

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RULE 84.06 CERTIFICATION

The undersigned certifies that the foregoing brief complies with Supreme Court Rule 84.06. According to the word count function of Microsoft Word by which it was prepared, it contains 13,329 words, exclusive of cover, Certificate of Service, the Certification and signature block.

The undersigned further certifies that the diskette filed herewith containing this brief in electronic form has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Plaintiff/Respondent Christian County, Missouri and one diskette were served by regular U.S. mail, postage prepaid, to Mr. David M. Harris at Greensfelder, Hemker & Gale, P.C., 2000 Equitable Building, 10 South Broadway, St. Louis, MO 63102, this 4th day of April, 2006.

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